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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 503.

RAU CONSTRUCTION COMPANY, A CORPORATION,
PETITIONER AND APPELLEE BELOW,

VS.

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
RESPONDENT AND APPELLANT BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Reasons Relied On for Allowance of the Writ—

I. The decision on appeal fundamentally erred in basic questions of substance and of special importance in the permanent public interests and in the public interests particularly affected in the present emergency.

The opinion contravenes good morals, public policy and Engineering ethics. It rewards the authorized deceit of Phillips Petroleum Company, but denies the simple arithmetic and common sense clearly demonstrated in trial Findings.

The errors gravely affect the Construction Industry and the Engineering Profession. Every concept of "unit price" construction contracts is nullified. That important type of engineering contract is designed to avoid delay to wait for detailed plans.

The Construction Industry is endangered by the approval of fraud, where it may readily be perpetrated, as the facts here illustrate. The Engineering Profession is bewildered by the decision.

The District Courts of the Eighth Circuit are obliged to grant others the fruits of deceit in inducing "unit price" construction contracts.

The decision erred in ignoring lawful trial Findings and in refusing to apply the controlling Missouri law and the same law declared at the same Term, to govern other litigants. Justice and equal protection of laws was thereby denied, contrary to the accepted course of judicial proceedings and to the law repeatedly declared here.

There is a firm faith in this Court to decide the questions and to correct the basic errors made on appeal or, otherwise, the now vital Construction Industry would be paralyzed and an unfavorable reflection of the United States Courts would follow, contrary to the public interests and the interests of the Judicial System 18

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OCTOBER TERM, 1942.

No. _____.

RAU CONSTRUCTION COMPANY, A CORPORATION, PETITIONER AND APPELLEE BELOW,

VS.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, RESPONDENT AND APPELLANT BELOW.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Rau Construction Company, a corporation, respectfully shows to this Honorable Court:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

1. An Eighth Circuit opinion of August 19, 194[illegible] (R. 1987; 130 F. 2d 499), reversed judgment of $140,582.53 allowed petitioner, as *quantum meruit* value of concrete construction work, accepted November 14, 1939, by Phillips Petroleum Company, as a small part of a seven million dollar refinery extension and polymerization "program," at Borger, Texas (R. 94). Petitioner's loss on reversal exceeds $150,000. *The grave errors of substance and of special importance in the public interests, and in the interests of the Construction Industry and Engineering Profession, which outweigh in importance even the loss affecting petitioner's solvency, are summarized, with the opinion, in "Reasons Relied Upon," infra,* p. 18, and are not here repeated.

2. An April 10, 1939, "unit price"[1] construction contract was induced, before structure plans were completed, by false engineering information and a false "cross section," supplied by Phillips' Engineer, acting in the scope of his employment. All information given was solely within Phillips' knowledge. That it was given, but was "not accurate" and "not intended to be accurate," and that the "cross section" was not "intended to constitute a true and representative 'cross section' of the work to be done" is affirmed by Paragraphs 4 to 23 (R. 61, 66) of Phillips' prolix trial Answer. Part of the information was supplied in Oklahoma (Par. 13). The April "contract" was signed by Mr. Gus Rau and delivered in Missouri (Par. 17, R. 65). Paragraph 20 and Exhibits to Answer, pages 72, 74, concede that before the Missouri contract was delivered, plaintiff assumed all of the liabilities of Phillips' project. Paragraph 15, R. 45, of the original Answer admits performance by plaintiff and acceptance by Phillips. Findings 12, 15 and 19 (R. 1905, 1909) establish that the assumption of liabilities was made voluntarily, to save Phillips a bond premium (about $4,000). In assuming the liabilities and in taking over the work on May 18, 1939, under its assumption of liabilities, at the request of Mr. Rau and with Phillips' consent, plaintiff relied, and was entitled to rely, on the truth of the representations made to Mr. Rau (plaintiff's officer and a director). The financial statement (R. 73), attached to Phillips' Answer, discloses the inevitable effect of the reversal. Reliance by plaintiff or Mr. Rau on the "infor-

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[1]From Annotation, 76 A. L. R. 269:

"It may be further observed that apparently, as to contracts undertaken upon the *unit basis*, as distinguished from contracts in gross, *special importance is generally attached to the work being other than as defined;* for in many of such cases the contract may be readily interpreted as one to perform only work of the indicated character."

From "Concrete Construction," Vol. 7, Encyc. Americana 469-70 (1941):

"The cost of concrete depends on the cost of cement, sand and stone, *upon conditions of work and size of work.* Where forms are simple, costs range from $5 to $10 per yard. Thin sections with expensive forms and handling may bring this up to $25 per yard. A reliable estimate must take account of all of the circumstances."

Italics where used throughout, are ours.

mation" is denied, but *on that narrow fact issue*, the trial court, of long and expert experience in engineering and construction cases, determined by Finding 15 (R. 1906):

3.

"From all of the evidence and inferences properly drawn therefrom, the only possible logical finding is that defendant furnished information substantially as claimed by plaintiff, without determining or knowing that it was true, and after undertaking to furnish information failed to make full disclosure of the facts; that Gus Rau, Jr., and plaintiff relied thereon and were entitled so to do, and that the information given and withheld substantially deceived Mr. Rau and plaintiff and misrepresented the *nature, size and kind of work* done, and damages resulted therefrom to plaintiff. Mr. Gus Rau, Jr., in signing the 'form of contract,' and plaintiff, in assuming liability to defendant and when it did the work, both relied on the representations made" (No. 15, R. 1906; cf. 1938-45).

Finding 8, R. 1904, determined (omitting immaterial words):

"Defendant knew that the information was sought as a basis to propose 'unit prices.' *The expected average cubic yards of concrete*, with the other information given, *intimately and directly affected the costs of doing the proposed work* and the amounts to be bid therefor. Materiality was known to defendant. *Mr. Hubbell testified (that) the size of items was a factor affecting costs.* If he read further from the 'cost estimate' the later figures would disclose smaller units, as most of the items read represented larger ones. Full disclosure of all facts available to and known by defendant was not made. Amended Answer, Third Defense (R. 62) *speaks for itself*, and need not be repeated."

Finding 7 (R. 1903) and No. 19 (R. 1909) establish *that correct engineering computations made on the information given* were used for the "unit prices" in the April "contract."[2]

[2]Mr. Rau (R. 1938-45) testified that an engineering "cross-section" should uniformly apply throughout a job. Phillips' En-

4. The Conclusions of Law establishing invalidity of the April "contract" and of a June 17th price memorandum, are not mentioned on appeal (R. 1931, 1932; R. 1922). All reference to Findings establishing compulsion and duress of goods are omitted. The reason therefor can only be the inevitable *felo de se*, following any mention of either. Finding 20 and Finding 24 (R. 1910 and 1917) (omitting immaterial words) read:

> "About June 16th, 17th and 18th, 1939, meetings were held at the work site. Defendant threatened to 'take over the job' and hold all money until completion if the work was not speeded up.
>
> Plaintiff had set up a central ready mix concrete plant, and assembled a quantity of material, tools and equipment, all located in defendant's fenced-in premises to which access was had only when passed by a gate watchman. Commitments were made for other material. Part of the work was incomplete. It was impractical for plaintiff to discontinue the work,

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gineer Hubbell said that the figures which he had read represented approximately 2,500 yards and "we could consider the rest of the concrete to be the same" average size.

The "cross section" and engineering information was relied on to compute the average *unit sizes, nature and conditions* (which are the "cost factors") of the project as it was thus represented. **The prices computed are specified in the April "contract" (R. 14).** The computations are detailed, R. 231-33, 261-268, and appear in Exhibits 2 and 3, R. 239, 257. The number of concrete pours for about 2/3 of the items was discussed with Phillips (R. 1498, 1499, 1501). Finding 7, R. 1903, determines that the computations were made correctly and Nos. 15 and 19, R. 1506-09, that they were properly relied on. The average size of structures determines the number of work operations. Finding 26, R. 1918, details the 9,485 excess work operations required to build the actual project, over and above the number needed for the represented project. Finding 27 shows the added, required hand excavating. Cf. Phillips' evidence in substantial support (R. 1666-9).

"Section" is defined as "a *representation*, picture or drawing, showing something, as a building, machine or geological formation as it would appear if it were cut by an intersecting plane and the portion between the observer and the cutting plane removed; sometimes, also the thing itself, if so treated and viewed." "Represent" is defined as "To bring before the mind; portray, whether by *language*, pictorial art, *or in some other way.*" Standard Dictionary (1941).

then or later, because of requirements insisted upon by defendant, or its failure to pay, or for differences between the work required and the original representations.

"Conferences were held on June 20th and July 1st. Defendant *again threatened* to 'take over the job' and demanded that plaintiff pour approximately 2,200 cubic yards of concrete in the next 15-day period, and *insisted that plaintiff go on with the work.*[3] Payments were still considerably in arrears. Plaintiff *was obliged by the situation to proceed regardless of the lack of justification of defendant's demands, and additional expense caused thereby"* (1,789 cubic yards *per month* represented orderly progress. No. 23, R. 1915).

5. Answer (R. 68) affirms that when Phillips "threatened, as it did," etc., that plaintiff "speeded up" the work. The conclusion is pleaded *that plaintiff* is thereby estopped; that it thereby waived fraud and ratified the April "contract." Proof of fraud and compulsion came even from Phillips' Chief Engineer (R. 1861, 1862), who naively testified: "I don't know whether you call it threatening. *I just told them.* Q. Twice on June 15 and June 30? A. That is right"—and he continued: that it was a true statement, that a simple order to the gate watchman would put plaintiff outside of Phillips' fence (R. 1862). Finding 5 (R. 1901) confirms his knowledge of the facts, when the "cross section" differences and an in-

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[3]The opinion says (R. 1992):

"The evidence shows that appellant, instead of abandoning the contract, *insisted always upon its performance."*

This is the one place where the opinion agrees with any part of any Finding. Cf. R. 1862. It overlooks Finding 33, R. 1921, which clearly establishes abandonment or breach of a construction contract, both under Missouri and general law. The opinion says

"it is difficult to attribute importance to (the) finding that the parties abandoned the contract or that the appellant breached it" (3). R. 1991.

Finding 33 expressly states that it is made *in the alternative,* that "even if it could be held that the 'form of contract' was or ever could have become a valid obligation, nevertheless, the evidence establishes that it was in fact abandoned by the parties." Cf. *Fuhler* v. *Gohman & Levine Const. Co.,* 346 Mo. 588, 142 S. W. 2d 482, l. c. 484, subd. 4.

voice therefor was presented to him and Engineer Hubbell, who supplied the "cross section." He exclaimed, *"Gus, if what you tell me is true, then we have no contract"* (R. 153, 176, 1811, 1812, 1820, 1858). However, he *"didn't put any importance to the matter,"* and Mr. Hubbell was never asked until after suit about what information he gave (R. 1858).

6. Phillips paid less than $15,000 when plaintiff had in excess of $150,000 in cash and commitments invested (No. 21, R. 1910). Over 100 concrete form carpenters were recruited from distant points because of the "speed up," but soon not even ten could keep busy (No. 23, R. 1915). *No independent Engineer was designated to prepare plans.* Phillips supplied them, but in peaks and valleys, for 10,735 cubic yards of concrete, of the 12,000 originally approximated (No. 23, R. 1915). An aggregate of 215 changes in about 500 plans were made after issue, although field orders to build accompanied the plans (No. 17, No. 23, R. 1909, 1915; R. 1848; 1629; Ex. 5, R. 271). Numerous "hold work for revision" orders increased plaintiff's costs. These destroyed orderly progress of the work for plaintiff,[4] while Phillips "made up its mind" about "the subject matter of the work to be done" (No. 16 to 18; R. 1906-1909). Some plans followed manufacturer's advice, obtained later when machinery was purchased (No. 9, R. 1904). The work ended November 14, 1939, instead of September 1st, or 15th, as represented. Phillips then ran out of plans and released plaintiff. Plaintiff sought its release before September (No. 23, R. 1916), but from early June Phillips exerted duress. A project of different *nature, conditions and unit sizes* was thus procured (No. 33, R. 1921). Large concrete units were built during the job and after it ended, by others. The April "contract" supplied no method to determine inclusions or exclusions. There *was no possible "meeting of minds" on "the subject matter of the work to be done,"* and *such Finding is made as a fact* (Nos. 16, 17, No. 9, R. 906, 904).

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[4]Phillips' Engineer Wise (R. 1635) explained:

Q. "Well, Phillips consulted its own convenience in ordering out the progress of the work to be done?"

A. *"It was our job and Rau was working for us."*

(That attitude may be proper under a "cost plus" contract, which is the only type Phillips could have procured, if a true disclosure of the facts had been made.)

7. Differences between the work and the represented "program" *could not be determined* until completion, because of promises of plans for numerous large (and more profitable) items shortly to be issued (No. 25, R. 1917). The work completed averaged less than 3 instead of 19 cubic yards per concrete pour; less than 110 instead of 700 square feet per form set-up. The ratio of hand to machine excavating was 109:98 instead of 20:80. Completed unit sizes were smaller; the required methods differed. Additional expensive hand excavating was required. A total of 9,485 separate, additional work operations, with added hand excavating, all aggregating $88,-481.50 in value, directly resulted because of differences between the completed and the represented job (No. 23 to 27, R. 1915-1919). Exhibit 46 (R. 1467) details the value of additional work of $124,093.84, with overtime and admitted items excluded. The completed project required plaintiff to perform over six times the number of costly work operations, above the number correctly computed for the falsely depicted job (No. 26, R. 1919).[5]

8. Unnecessary overtime of $4,392.20 was ordered by Phillips, for its convenience, knowing of the added costs (No. 23, R. 1914). Nothing was paid therefor. Only $230.60 for overtime is included in Phillips' judgment consent (No. 1, R. 1898). $230.16 for fine grading, etc., caused by changes in plans (No. 28, R. 1919), and $152.98 for tooled edging, not shown on the plans, and ordered after Phillips was advised of the cost (No. 29, R. 1920), were allowed. All are outside of any express contract term. They *are not mentioned* on appeal, but *are reversed*. Relief was denied on prayer for rehearing (R. 2001).

9. Trial was of the simple *quantum meruit* issues in *assumpsit*. The trial court twice stated the issues, at R. 89, and in Memorandum Opinion (R. 1871). After *profert and oyer*, Phillips asked *terminer* of the April Missouri contract, and of a June 17, 1939, Texas memorandum, with 19 price paragraphs, but none of its paragraphs were directly in issue. That memorandum was written by Phillips' Chief Engineer and was signed at the mid-June meetings where

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[5]Cf. R. 265-9; Ex. 7, 297; Ex. 5, 271; 369-372; Ex. 11, Vol. 4; 793-829; 1449-1458; Ex. 16, 831; Ex. 20, 835; Ex. 21, 851; Ex. 22, 855.

the threats were made. It was invalid for duress and for the fraudulent promises made and not intended to be performed (Findings 21 to 25, R. 1910). Plaintiff asked no determination of its invalidity but used it, with other evidence, to show reasonable value of concrete forms and panels, which plaintiff built but never got to use (and did not get paid for), because of Phillips' 215 changes in plans. Finding 22 (R. 1911) allowed $35,597.16 therefor. See Questions Presented No. 5, *infra*, p. 15. Because Phillips asserted a defense under June Paragraph 4 (which was denied by Finding 22), it exactly followed the common law rules designed to require express contracts (when fully performed on one side) to be filed in court, so that *the determination of their validity, as a defense, could be governed by equitable principles at law,* without resorting to the competing Chancery Courts. The determination, made at Phillips' request, was: *Neither April nor June "contracts" are valid as a defense* (Conclusions denied, R. 1931; given, R. 1922). The composite case reversed (according to the opinion) is *quantum meruit* and for *damages for fraud and deceit, damages for* breach and *damages* for abandonment (R. 1988). Phillips, and the opinion, assert the June "contract" supplemented that of April. If so, it supplemented a nullity and a fraud and was stillborn. Its obvious and only purpose was to fix a "price ceiling" for "extra" and "additional" work required, for which Phillips was clearly liable. The "extra work" (particularly the $35,597.16 allowed by Finding 22) was payable 30 days after the job ended (Par. 35, R. 15). The alleged defense was designed in June. No records of form losses were produced by Phillips. It preferred concealment. Assuming validity on appeal, of the June "contract" without discussion, was simple, after life was conferred on the void April "contract." Discovery of "accord and satisfaction," "compromise and settlement" and "accounts stated" (although never pleaded below, and despite their denial by Phillips' own evidence) also were no problem. Long after trial, at oral arguments carefully heard in the trial court (R. 1878), before finally filing his indicated Findings, for the first time Phillips then announced that it had "dug up a case" (R. 1391) and asked for a Conclusion, that, if the April and June contracts were invalid, its "extra work orders" were binding contracts. These were never used to order "extra work," as specified in April Contract, Paragraph 5 (R. 6), how-

ever (R. 1659-62). Phillips prepared them for everything, after the work was done. That Conclusion was denied (R. 1932). Finding 32 (R. 1921) determined that the "extra work orders" were nothing but field memoranda, and ends with a Conclusion of Law, reading, *"There is nothing in the entire evidence on which a waiver, ratification or an estoppel by plaintiff may be predicated."* Finding 25 (R. 1917) determined *that fraud was not discovered until completion.* At R. 2032, it was carefully pointed out that the trial court conducted his own examination to determine the facts, that the hand excavating, done early in the job, was at Phillips' request, to avoid damage to concealed pipes. Phillips paid for that until the June memorandum was signed; thereafter no payment was made but the same work was compelled.

10. That plaintiff derived no benefit from the June agreement, or that any April "unit price" was increased, is denied by Phillips' Chief Engineer (R. 1809, 1814), who discusses the items of *"extra work"* or *"additional work,"* for which he set a "price ceiling" in the June memorandum. That there was no accord or satisfaction from checks or "statements of estimates" (a mere list of "extra work orders") is denied by the Record, Findings and Phillips' evidence. Stipulation (R. 1089) shows that the only endorsement on checks was: "In full settlement of the within account." R. 1090-91 is a copy of Phillips' financial records, and *lists every check.* It definitely establishes *there was never a check issued by Phillips,* for $2,010.23, with an accompanying statement, or for any like amount (cf. Opinion, R. 1994). Phillips' Exhibit 45 (R. 1366; its Exhibit 40, R. 1244); its Chief Engineer (R. 1820-22, 1937); and its Engineer Hubbell (R. 205-207) all deny the conclusions on appeal (R. 1993), that a settlement of the claims in suit followed the acceptance of any check. The two checks received after completion are shown in the above letters and records. They were paid for Phillips' benefit, to discharge lienable bills at its request, and a list thereof was furnished as agreed (R. 1820, 1837, 205). The express agreement is established by Phillips' evidence and by Finding 5 (R. 1900), that *every claim in suit would remain open, without prejudice, until a meeting with Phillips' Mr. Riney, at Bartlesville, which was held December 20, 1939,* or exactly seventeen days after receipt of the last check accepted. Plaintiff's men went there at their own expense at Phillips' request. The

only check ever offered as final settlement was for $1,-787.51, dated December 21, 1939, which was promptly returned (Exhibit 4, R. 1244). Finding 1, R. 1899, established from the evidence, for the first time, just what items were included in Phillips' judgment consent. It also finds that the original answer admitted $2,108.53 and not $2,010.23. April "contract," Paragraph 35 (R. 15), specifies that all payments, except the final one, are only "*estimated to be due.*" Final payment was due 30 days after completion (or December 14th) and then only after Phillips' Engineer certified to the whole value of all "contract" and "extra work," which has not yet been done. The last check accepted was December 3, 1939.

11. Finding 1 (R. 1898) determined that jurisdiction was based on diversity of citizenship. There is no intimation of that on appeal, nor is there anything to indicate a Missouri contract for Texas work, induced by false representations made in Oklahoma and Texas.

12. These matters were urged on original hearing and in petition for rehearing (R. 2030, 2040). It was overruled, without comment and without correction of plain errors of fact. The opinion is not only without record confirmation but it is expressly denied by Phillips' evidence and financial records, as stated. These and the many anomalies presented under "Reasons Relied Upon" (p. 18) seem to differ with the accepted course of recognized judicial proceedings in United States Courts.

13. Nothing was overlooked, for Phillips. The trial answer of November 13, 1940 (R. 69), was to the complaint filed January 2, 1940. Under Missouri law that was demand, to start interest. By Texas law, interest started January 1, 1940. Answer, Paragraph 23 (R. 66), admitted $2,010.23 was due and consented to such judgment, with costs. The directions on reversal require judgment entry of $2,010.23, but on filing the mandate. Interest was disallowed on even that. Phillips did not bring its falsely represented conditions, integral to the contract subject matter, into existence. It had no contract with mutuality of obligation to enforce. Fraud and duress unjustly enriched it and it obtained a further bonus in the high premium paid by plaintiff, in waiving damages for delay (final Paragraph Finding 23, R. 1916) and damages for fraud. That was done to insure recovery, under the

equitable rules governing assumpsit, of bare reasonable value of work done (without recovery of other losses sustained). Petitioner was denied all. Phillips' conduct was rewarded on appeal, by grant of more rights than any contract ever reserved. Different facts and a different action were assumed, for Phillips. Duress findings were plainly ignored. Any reference thereto rendered reversal impossible. Opinion (2) (R. 1989) says: "In *the view we take* of this case, it is unnecessary to discuss the findings * * * that appellant was guilty of fraud in inducing the execution and performance of the contract." What else is established by the record, answer and Findings?

STATEMENT OF THE BASIS OF JURISDICTION.

(a) U. S. C., Title 28, §§347 (a) and 377, and Rule 38 of this Court, are the basis of jurisdiction.

(b) The questions of substance and of public concern which are of special importance in the public interests are stated in the "Reasons Relied On For Allowance of the Writ," p. 18 herein. These cases sustain jurisdiction:

Layne & Bowler Co. v. *Western Well Works*, 261 U. S. 387, 392, 67 L. Ed. 712.

Magnum Import Co. v. *Coty*, 262 U. S. 159, 163, 67 L. Ed. 922.

(c) The decision on appeal contravenes Rule 52 (a), Federal Rules of Civil Procedure, and U. S. C., Title 28, §§773 and 875, and these cases, which sustain jurisdiction:

State Farm Mutual Auto Ins. Co. v. *Coughran*, 303 U. S. 485, 487, 82 L. Ed. 970, 972, subd. 1.

Deputy v. *DuPont*, 308 U. S. 488, 497, 84 L. Ed. 416, 423, subd. 6.

Law v. *U. S.*, 266 U. S. 494, 496, 69 L. Ed. 401, 402.

The error of the decision in failing to declare and apply the controlling state law and in denying equal protection of laws (see *infra* p. 22) is shown by these decisions which also sustain jurisdiction:

Griffin v. *McCoach*, 313 U. S. 498, 85 L. Ed. 1481.

Klaxon v. *Stentor Elect. Mfg. Co.*, 313 U. S. 487, 85 L. Ed. 1477, 1480.

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169, 85 L. Ed. 109.

Pecheur Lozenge Co. v. *Nat. Candy Co.*, 315 U. S. 666, 86 L. Ed. (adv.) 739.

(d) The substantive rights denied by refusal to apply the equitable rules governing an assumpsit action contravene:

Guerini Stone Co. v. *P. J. Carlin Const. Co.*, 248 U. S. 334, 343, 63 L. Ed. 275, 284.

Stone v. *White*, 301 U. S. 532, 534, 81 L. Ed. 1265, 1267.

Phillips & Colby Const. Co. v. *Seymour*, 91 U. S. 646, 23 L. Ed. 341.

(e) The decision reversing the judgment of the District Court was filed August 19, 1942 (R. 1994). It is reported, 130 F. 2d 499, and appears, R. 1987. Petition for Rehearing (R. 1995), filed September 2, 1942 (R. 2042), was overruled, without comment, on September 24, 1942 (R. 2043). Order staying mandate for thirty days was filed October 2, 1942 (R. 2044).

QUESTIONS PRESENTED FOR DECISION.

1. Was it error to reverse a contractor's judgment of $140,582.53, entered as the value of concrete construction work performed under compulsion, above the requirements of a project falsely depicted and which induced a "unit price" construction contract?

2. Are these rulings, made in support of reversal, erroneous, to-wit:

(a) Under Missouri law it is not fraud, but only an "expression of opinion or expectation," before unit plans are drawn, to supply a false "cross section" and false engineering information, through an authorized engineer acting in the scope of his employment, to induce a "unit price" construction contract?

(b) A "unit price" construction contract is not abandoned nor breached, nor is there any recourse, where the

contractor is required by compulsion to erect a project of different *nature, conditions and unit sizes* from the represented project, and costing nearly $125,000 more to build?

(c) A "unit price" contract made before unit plans are drawn, for construction of approximately 12,000 cubic yards of concrete, does not require certainty of engineering "job cost factors"?

(d) If there was any original contract uncertainty, it vanished seriatim, with the delivery of plans as issued by the owner, where no independent Engineer was designated to draw them. The owner had the right to supply plans, with 215 changes made after the first issue of 500 plans, for a project contrary to prior, definite representations of the *nature, conditions and unit sizes* of construction, and a judgment allowing the exact difference in value is "not justified" and must be reversed?

(e) The printed contract of Phillips Petroleum Company, providing that it shall not be liable for "any quantities expressly stated or implied *by any of its representatives*" (R. 7, Par. 8), released all liability for the reasonable value of all construction work performed under compulsion, in excess of the requirements of a "unit price" contract induced by false engineering information and a "cross section," *supplied* (before unit plans were drawn) *by Phillips' Engineer, acting in the scope of his employment* (Answer, Par. 12, R. 63). Although delivered in Missouri by agreement (Finding 13, R. 1909), it should be enforced by reversal, with no mention of the Missouri public policy which condemns such contracts?

(f) Mutuality of obligation inheres in a "unit price" contract specifying that the owner may terminate it and all liability thereunder, at will, by paying the value of completed work in place, but without paying for uncompleted work, or for the cost of moving men, materials and equipment in, and then out again, upon such termination?

(g) Performance, under compulsion, of an entirely different and more costly project than that originally represented to induce a "unit price" contract is performance of the contract and supplies any original want of mutuality, if it was lacking at its inception?

3. If error, *are such determinations in the public interests;* was Phillips Petroleum Company thereby granted

the fruits of authorized fraud and deceit; do they endanger the Construction Industry and tend to delay construction vital to the public interests in the present emergency, and are the high principles of the United States Courts truly reflected in the public interests and in the interests of the Judiciary?

(a) Is it in the public interests that District Courts of the Eighth Circuit, in following the decision, will be bound to (1) grant the fruits of fraud to those who so induce "unit price" construction contracts (2) follow the rule of *Roosevelt* v. *Mo. State Life Ins. Co.*, in fraud cases governed by Missouri law (3) enforce contracts relieving in advance from all liability for authorized fraud and (4) rule that it is not fraud, but merely an expression of opinion or expectation, to wilfully misrepresent unit sizes and "job cost factors" to induce construction contracts?

4. Did the decision err and does it conflict with rulings of this Court, in failing to consider or to determine whether there was any substantial evidence to support trial Findings?

(a) Did it err in ignoring supported trial Findings, without consideration of, or comment thereon?

(b) Did it err in either respect, or deny equal protection of laws, when the same Court, at the same Term, declared for other litigants, that trial Findings are presumptively correct and, if supported by substantial evidence, will bind determination on appeal?

(c) Did it err in a diversity of citizenship case, in failing to declare or apply the controlling law, or did it avoid that error by ignoring the basis of jurisdiction and ignoring that the contract enforced by reversal was for Texas work but was delivered by agreement in Missouri and was induced by deceit accomplished in Oklahoma and Texas?

(d) Did it err in failing to apply the controlling declared Missouri law on fraud and in citing and following the former Circuit rule declared before *Erie R. R.* v. *Tompkins*, when the same Court, at the same Term, declared for other litigants, that the former Circuit doctrine of *Roosevelt* v. *Mo. State Life Ins. Co.* may no longer be assumed to apply in any case governed by the Missouri law on fraud? (Page 23 herein.)

(e) Was equal protection of laws thereby denied?

(f) Did it err in failing to follow the Missouri law declared in the first Missouri case cited in the opinion (R. 1993), when Phillips' own evidence indisputably established that every claim in suit was left open, without prejudice, until reviewed at a meeting held seventeen days after the last check was accepted. and that by agreement the checks were delivered in Missouri? (Page 9 herein.)

(g) Did it err in the same conclusions, when Paragraph 35 (R. 15) of the "contract" which Phillips pleaded as a defense, specified that all payments, except the final payment, are only "estimated to be due" and that the final payment will be due not earlier than 30 days after completion, and the last accepted check was received 11 days prior to the expiration of that time?

(h) Was there error in the same rulings, when the questions were never in issue below, and "accounts stated," "release," "compromise" or "accord and satisfaction" were not pleaded by answer?

5. The decision (R. 1992) reversed $35,597.16, allowed "For loss of (concrete) forms, form panels and reuse, totalling 355,971.64 (square) feet, at 10c per foot, per Finding 22" (R. 1911), with the statement that the allowance was "not justified by anything in the conduct of the parties or in the words of their agreement" to pay ten cents per foot under Paragraph 4 of memorandum of June 17 (R. 18) "For changes in forms caused by a change in the plans." Supported Findings 22 (R. 1911); No. 31 (R. 1920); No. 20 and No. 21 (R. 1921); and No. 17 (R. 1908), and denial of requested Conclusions of Law (R. 1931) established these facts:

(a) The agreement was invalid for fraud and duress. The allowance was made as reasonable value under implied contract. The trial court, under the law of the forum, found also that the language was ambiguous and, after hearing the evidence of the parties who made it, arrived at the identical results. whether the agreement was valid or invalid (Finding 22). The above Findings established:

(b) 15.4c per square foot "contact area" was specified in the April "contract" (R. 14) but that sum was

paid only for the exact area of concrete forms which touched and held erected concrete. Contract, Paragraph 5 (R. 6), provides for changes in plans, but requires agreement for the price and extent of work caused thereby. Nothing whatever was paid for concrete forms built ready for use, nor for the form panels which were used at Phillips' direction and which were fabricated to be used on one structure, shown by issued plans, and were designed to be successively moved and re-used to pour the concrete for similar structures, likewise shown by issued plans. The area of concrete forms and panels, mentioned above, was completely lost for any use after the expense of building or fabricating was incurred, because of the 215 changes made in the plans by Phillips, after their delivery, with orders to erect.

(c) Phillips paid nothing whatever for the $35,597.16 loss resulting from the useless fabrication of costly panels nor for erecting unused concrete forms. $1,165.67 was included in its judgment consent, for a few items, based on memory alone. Plaintiff's proof was by actual field records. Phillips' Engineers were ordered to keep such records. None were produced. Phillips took advantage of the lower rate for forms wrecked by its trucks, etc., although Finding 22 states that Phillips' own evidence indicated that it should pay 15.4c for many items (Finding 22, R. 1911; No. 31, R. 1920; No. 17, R. 1909; No. 1, R. 1898; Ex. 5, R. 295; Phillips' Ex., R. 1380, 1381; Phillips' Evidence, R. 1658-9).

Phillips' letters (R. 1381, 1382) referred to therein confirm Finding 22 (R. 1911). The exact amount computed in these letters is included in the judgment consent. Finding 1 (R. 1898). After trial, Phillips re-confirmed the admissions made by its request for Conclusion VIII (R. 1932). These facts were clearly presented (R. 2002) without result. Was the reversal error?

6. Was it error to overrule petition for rehearing, without comment and without correction, when (R. 2009) attention was clearly invited that even under the erroneous ruling here made, Finding 22 established that Exhibit 5 (R. 295) was correct and on the face of that exhibit petitioner was entitled to a minimum of $5,341.95 not paid for concrete forms erected ready for use, but which could not be used because of changed plans?

7. Was an aggregate of $4,775.34 properly reversed without any comment or reference thereto, where trial Findings established that the allowance was for overtime specially ordered, without necessity and for the convenience of defendant, with knowledge of the added costs, and for items of additional work, all outside of the terms of any express contract? (R. 2001.)

8. Was it error to rule:

(a) That fraud was known early in the work from discovery of a difference in ratio of hand to machine excavation?

(b) That a "supplemental agreement" "substantially increased the contractor's compensation" after discovery of fraud and effected a waiver of fraud, or compromise thereof?

when the decision ignored trial Findings, which established that differences between the work and "cross section" representations were not discoverable until completion, and that there was nothing in the entire evidence on which to predicate a waiver, ratification or estoppel of plaintiff, or to deny it the reasonable value of additional work performed under compulsion. Defendant's Conclusions requested in an assumpsit case, to declare the alleged "supplemental agreement" valid and that it was not obtained by fraud, were denied. Findings determined facts which establish that the "agreement" was invalid for both fraud and duress. Compromise was not pleaded nor in issue below. The trial Court conducted its own examination to determine that the "hand excavating" was performed at Phillips' request on oral agreement to pay the additional cost for locating concealed pipes to avoid damage by excavating machinery. The alleged "supplemental agreement" confirmed the prior, oral agreement but after compulsion was exerted the same work was thereafter required without compensation? (See Page 7 herein.)

9. Was it error to reverse a composite *quantum meruit* case and an action for damages for fraud and deceit; for breach and for abandonment, when only simple assumpsit issues were pleaded and tried? (Page 7 herein.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The decision on appeal fundamentally erred in basic questions of substance and of special importance in the permanent public interests and in the public interests particularly affected in the present emergency.

The opinion contravenes good morals, public policy and Engineering ethics. It rewards the authorized deceit of Phillips Petroleum Company, but denies the simple arithmetic and common sense clearly demonstrated in trial Findings.

The errors gravely affect the Construction Industry and the Engineering Profession. Every concept of "unit price" construction contracts is nullified. That important type of engineering contract is designed to avoid delay to wait for detailed plans.

The Construction Industry is endangered by the approval of fraud, where it may readily be perpetrated, as the facts here illustrate. The Engineering Profession is bewildered by the decision.

The District Courts of the Eighth Circuit are obliged to grant others the fruits of deceit in inducing "unit price" construction contracts.

The decision erred in ignoring lawful trial Findings and in refusing to apply the controlling Missouri law and the same law declared at the same Term, to govern other litigants. Justice and equal protection of laws was thereby denied, contrary to the accepted course of judicial proceedings and to the law repeatedly declared here.

There s a firm faith in this Court to decide the questions and to correct the basic errors made on appeal or, otherwise, the now vital Construction Industry would be paralyzed and an unfavorable reflection of the United States Courts would follow, contrary to the public interests and the interests of the Judicial System.

A.

Basic Errors on Appeal.

The fundamental errors on appeal are of the gravest concern in the Construction Industry. They astound the Engineering Profession.[6] By analogy, the ethics and arithmetic taught on appeal is: An owner may induce a unit price of $100 for erection of one 10 yard cube of concrete. It may, at the same price, thereafter require the contractor to dig the holes and pour the same amount of concrete to form the base of 300 separate highway markers. Under the supported Findings of Fact in the record, the decision on appeal determines:

1. There is no fraud in inducing a "unit price" construction contract, by knowingly supplying false information and a false engineering "cross-section," before plans are drawn. Such deceitful representations "if made and if false" are mere "expressions of opinion or expectation." Opinion (2) (R. 1989). Likewise, it is immaterial that the owner alone knew the true facts and could change the plans at will, where no independent Engineer or Architect was employed. Answer, Par. 12, R. 63, admits: that everything given, was with authority, but it was "not accurate and not intended to be accurate."

2. "Unit price" construction contracts require no certainty of "job cost factors." Any original uncertainty is removed *seriatim*, as plans are received during progress of the work. The plans may depict a project of any *nature, conditions or unit sizes*, re-

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[6]Cf. *Picard* v. *United Aircraft Co.*, 128 F. 2d l. c. 641, saying "it is intolerable that the public interests should be at the mercy of the haphazard scientific information of judges." After stating a difficulty to understand, *United Const. Co.* v. *City of St. Louis*, (Mo.) 69 S. W. 2d 647, subd. 9, says:

> "The contract deals with an engineering proposition, abounds in technical and scientific terms, and was to be carried out by men learned in that line of work. An expert in that line of work was best fitted to interpret the contract and solve the controversies. * * *"

That "human society is not so organized that a dispute between A and B can be of no concern to anybody else" is stated in Note 7, l. c. 295, in *Aero Spark Plug Co.* v. *B. G. Corporation*, 130 F. 2d 290, 295.

gardless of prior representations. Opinion (1) (R. 1988).

3. Contracting in advance against all liability for authorized fraud is valid and properly enforced by reversal on appeal, without mention nor application of the governing Missouri public policy, which condemns such contract provisions. Opinion (2) (R. 1990).

4. There is mutuality in a "unit price" construction contract which may be terminated at will by the owner, upon paying the value of work completed according to specifications and in place, but without paying anything for moving in men, materials, machinery, sheds, field offices, shops, etc., and then moving them out again. Partially completed construction need not be paid for. Moreover, want of original mutuality is removed by building, under compulsion, an entirely different project, costing nearly $125,000 more (excluding overtime and undisputed items). That is performance, to make the contract binding, if it was wanting in mutuality or was too indefinite to be enforceable at its inception. Opinion (1) (R. 1989).

5. A "unit price" contract is not breached nor abandoned, nor is there any recourse for the contractor, who is required, under compulsion, to build a project of different *nature, conditions and unit sizes* and costing nearly $125,000 more than the originally depicted project (excluding overtime and undisputed items). Opinion (3) (R. 1991).

6. An aggregate of $4,775.34, allowed by trial Findings for overtime and additional work, required under compulsion and outside of any possible contract terms, may be reversed on appeal, without mention. Findings 23, 28, 29 (R. 1919; Rehearing, 2001).

The only interpretation of this decision in Engineering and Construction fields is that the United States Courts refuse to recognize as fraud the intentional, authorized misrepresentation of "job cost factors," where falsely made to induce "unit price" contracts. The inevitable disruption, with extensive litigation necessarily following, is disturbing in this vital Industry. That reflection of United States Courts is not in the public interests.

The generality of statement and failure to declare the law guiding the decision on appeal, may only be interpreted to mean that the doctrine erroneously announced, *is of universal application* throughout the United States and in every state. The importance of the rules of *Klaxon* v. *Stentor* and *Griffin* v. *McCoach, etc.* (cited but ignored on appeal, R. 1999), is here made manifest.

B.

The Engineering Purpose and Design of "Unit Price" Type of Contracts and Their Vital Importance Now.

The reversal destroys and denies realization of the basic engineering design of "unit price" contracts. That is the type reviewed. The type enforced defies description. The opinion (R. 1992) says that the right to change plans was reserved, but it says nothing of the coordinate provision (R. 6, Par. 5) requiring advance agreement *on the price and extent of work* so caused.

"Unit price" construction contracts (now, especially) are an important general engineering type, designed to avoid construction delay to wait for detailed plans. The *extent or total amount* of any classification of work, or *of the whole project*, may legitimately be changed, within reasonable limits. However, *the conditions, nature and unit sizes of a project, as represented to the contractor,* are the only "cost factors" available to compute "unit prices," particularly, where unit plans are not complete. *Those represented "cost factors"* may not be altered at will by the owner (as was done here), without a breach or an abandonment of a "unit price" contract, if it is possible to conceive an original "meeting of minds" thereon, or if fraud did not vitiate it. In this respect, this type closely resembles a "lump sum" contract.

Judicial consideration of the lawful Findings of an engineering-experienced trial court, would have made the errors impossible. The Findings demonstrate, by simple arithmetic, that the plans issued during construction, for 10,735 of an approximated total of 12,000 cubic yards of concrete, required a project of materially different *nature, conditions and unit sizes* from those falsely represented to induce the April "contract." Because of those vital differences, the record and Findings establish that plaintiff actually performed over 9,485 separate work operations and additional work valued at $88,481.50. *Exhibit*

46, R. 1467, details the totals of $124,093.84, for additional labor and material and itemizes each class of work and the entire project (excluding overtime and admitted items). Plaintiff was paid the exact sum it would have received without that expenditure, if Phillips brought the false program into reality.

The ratio of 10,735:12,000, for completed to approximated work, approaches *a reasonable change in the total extent or amount of the construction.* No damages for breach or abandonment therefor were claimed. The opinion, however, reverses such an action. No distinction was found between a change in *extent* of construction and changes made in the *nature, conditions and unit sizes* of the project despite the definite Findings which made that so very obvious.

The decision acts as a "stop order" for all projects if misrepresentation appears, no matter how vital they may be. Continuing the work, or any adjustment, despite or to endure duress, or an agreement to accept pay for hand trenching ordered to protect pipes from excavating machinery, effects a waiver or compromise, under the teachings here. That result also follows acceptance of money indisputably due, to pay lienable bills therefrom at Phillips' request, with a concurrent agreement that the controverted claims (later sued for) will remain open, until a subsequent conference. Such is an accord, if no satisfaction, but requires reversal, if this decision rightly rules.

C.

The Denial of Equal Protection of Laws and Other Errors on Appeal.

The denial of equal justice and equal protection of laws destroys a private interest, but that is of public concern. Implicit public faith in equality of justice without denial (inadvertently or otherwise) is essential for orderly government. Petitioner filed its complaint, firm in that faith. Indisputable rights, existing even under the errors made, were denied, without comment, on prayer for rehearing (R. 1998-2001).

The same Court, however, *at the same Term,* declared and applied for other litigants:

1. That trial findings are presumptively correct, and, if supported by substantial evidence, bind the determination on appeal. *American Insurance Co.* v. *Scheufler,* 129 F. 2d 143. *Chicago Mill & Lumber Co.* v. *Tully,* 130 F. 2d 268, 274, 275.

2. *Roosevelt* v. *Mo. State Life Ins. Co.* is the first case cited in Opinion (2), R. 1990, in support of its fraud conclusions. With the same presiding Judge as here, it was declared in *Dubinsky* v. *Lortz,* 129 F. 2d 669, 673, that the *Roosevelt case Circuit fraud doctrine may not be assumed to apply* in fraud cases governed by Missouri law.

The governing Missouri "waiver of fraud" rule was printed at length, in Petition for Rehearing (R. 2074), from a case cited in, but misapplied by, the opinion. The governing rule of fraud was also printed (R. 2025). That case is not cited in the opinion and the contrary statement at R. 2027 is error. The Missouri law was ignored.

The opinion (1) (R. 1988) errs in presuming that a Petroleum Company "can do no wrong." History denies that. *United States* v. *McMullen,* cited in support, is the only mentioned construction case, where an *independent* architect or engineer *was not designated* to prepare the plans. The presumptions attending Sovereignty or Government Departmental Engineers are an incongruity here.[8] Correction of specific fact errors, directly contrary to the record (R. 2030, 2037, 2039), were denied. The many anomalies are inconsistent with the accepted course of judicial proceedings. The existence of the power of review vested in this Court usually suffices to render its frequent exercise unnecessary. It failed here.

The decision and opinion erred in each and every respect stated, and erred (a) in failing to declare and apply the controlling state law in a diversity of citizenship case; (b) in failing to adjudicate the only questions presented, to-wit: are the trial Findings supported by substantial evidence and do they sustain the judgment (c)

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[8]Cf. Secs. 216-218; 340-341. Engr. & Arch. Juris., J. C. Wait, M.C.E. Cornell; LL.B. Harvard, 1st Ed.; 17 C. J. S. 772, N. 51, 55; 9 C. J. 695, N. 32; 697, N. 64, 68, 69.

in ignoring Findings entirely, (d) in contravening the controlling law in each and every ruling made and by the determination (e) in reversing a composite damage action for fraud and deceit, breach and abandonment, when only simple assumpsit issues were presented by the record and (f) in reversing Finding 22 under the facts specified in questions presented, No. 5.

Prayer for Writ.

Your petitioner prays that a Writ of Certiorari issue under seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the case of *Phillips Petroleum Company, a Corporation, Appellant,* v. *Rau Construction Company, a Corporation, Appellee,* No. 12138, to the end that this cause may be reviewed and determined by this Court as provided for by law; and that the findings and decision of said Circuit Court, to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

Rau Construction Company,
a corporation,
Petitioner,

By MAURICE J. O'SULLIVAN,
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Attorney for Petitioner.